

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JERMAINE BARNETT,	§	
	§	No. 164, 2006
Defendant Below,	§	
Appellant,	§	Court Below--Superior Court
	§	of the State of Delaware, in and
v.	§	for New Castle County
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	Cr. ID No. 9506017682

Submitted: July 27, 2006
Decided: August 14, 2006

Before **HOLLAND, BERGER** and **JACOBS**, Justices.

ORDER

This 14th day of August 2006, upon consideration of the notice to show cause, the response to the notice to show cause filed by the appellant, Jermaine Barnett, the State's memorandum in support of dismissal, and Barnett's response to the State's memorandum, it appears to the Court that:

(1) By consolidated decision dated and docketed December 6, 2005, the Superior Court denied Jermaine Barnett's *pro se* motion for postconviction relief.¹ Barnett filed a notice of appeal on March 30, 2006.

¹See *State v. Barrow*, 2005 WL 3436609 (Del. Super. Ct.) (denying motions for postconviction relief filed by co-defendants Hector S. Barrow and Jermaine Barnett).

(2) An appeal from the Superior Court's denial of postconviction relief must be filed "[w]ithin 30 days after entry upon the docket of [the Superior Court's decision]." ² Barnett's notice of appeal indicated on its face that it was, in fact, an untimely filing.

(3) On March 31, 2006, the Clerk issued a notice directing that Barnett show cause why the appeal should not be dismissed as untimely filed. ³ Barnett responded that the appeal was untimely because the Superior Court had failed to notify him of the December 6, 2005 decision in a timely manner. The record supports Barnett's contention that the Superior Court failed to send him a copy of the December 6, 2005 decision. ⁴

(4) Barnett represents that he was not notified of the December 6, 2005 decision until January 13, 2006, when he received a Superior Court docket sheet that he had requested from the Prothonotary. Upon reviewing the docket sheet and realizing that the Superior Court had issued a decision on his

²Del. Supr. Ct. R. 6(a)(iii) (2006).

³Del. Supr. Ct. R. 29(b) (2006).

⁴Barnett and his co-defendant proceeded *pro se* in the Superior Court. Nonetheless, neither Barnett nor his co-defendant is included in the distribution list on the front page of the December 6, 2005 decision.

postconviction motion, Barnett immediately sent a letter to the Prothonotary and requested a copy of the decision.

(5) Barnett contends that he waited for the Prothonotary to respond to his request for a copy of the decision. The Prothonotary did not respond. Finally, after waiting more than two months, Barnett filed the notice of appeal.

(6) The time period within which to file a notice of appeal is mandatory and jurisdictional.⁵ An untimely appeal cannot be considered unless the appellant demonstrates that the delay in filing the notice of appeal is attributable to court-related personnel.⁶

(7) Barnett contends that his delay in filing the notice of appeal is attributable to the Superior Court's failure to send him a copy of the December 6, 2005 decision followed by the Prothonotary's failure to comply with his request for a copy of the decision. Barnett requests that the Court accept his explanation for the untimely appeal and discharge the notice to show cause.

(8) The Court is constrained to deny Barnett's request. On similar facts in a previous case, we dismissed an untimely appeal when the appellant failed to file the notice of appeal within thirty days of receiving the Superior

⁵*Carr v. State*, 554 A.2d 778, 779 (Del. 1989).

⁶*Bey v. State*, 402 A.2d 362, 363 (Del. 1979).

Court docket sheet.⁷ We are unable to conclude that Barnett's case warrants different treatment.

(9) It was incumbent upon Barnett to file the notice of appeal within thirty days of January 13, 2006, the date he admittedly received the Superior Court's docket sheet that notified him that the court had ruled on his motion for postconviction relief. Unfortunately, after receiving that notice on January 13, 2006, Barnett waited seventy-six days before filing the notice of appeal.

(10) Apparently, Barnett believed that he was required without exception to file the notice of appeal with a copy of the decision attached. The Supreme Court Rules expressly provide, however, that a decision on appeal does *not* have to be attached to a notice of appeal if the decision is unavailable.⁸ Barnett could have filed his notice of appeal in a timely fashion with a statement indicating that the December 6, 2005 decision was unavailable.⁹

⁷*Davis v. State*, 2000 WL 949647 (Del. Supr.); *see also In re 1989 GMC Sierra Pickup Truck*, 1998 WL 382632 (Del. Supr.) (dismissing untimely appeal after appellant conceded that he was notified of the decision during a telephone conversation with court personnel).

⁸*See* Del. Supr. Ct. R. 7(c)(9) (2006) (providing that a copy of the order on appeal, if available, shall be attached to the notice of appeal, "and if not available, a statement indicating such unavailability shall be included").

⁹*Cassidy v. State*, 1996 WL 376927 (Del. Supr.).

(11) The record does not reflect that court-related personnel prevented Barnett from filing his notice of appeal within thirty days of receiving the Superior Court's docket sheet. Under these circumstances, we are compelled to hold that Barnett's appeal was untimely filed.

NOW, THEREFORE, IT IS ORDERED, pursuant to Supreme Court Rule 29(b), that the appeal is DISMISSED.

BY THE COURT:

/s/ Carolyn Berger
Justice